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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1418

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, BERT W. JOHNSON, County Manager, and ROY McLAREN, Chief of Police of Arlington County,

Petitioners,

v.

RUDOLPH A. RICHARDS, MARIO A. CARBONI, FRANK TOMEK, THOMAS BECK, BRAXTON H. TABB, JR., MICHELLE McKENZIE, ELMER P. BORKOWSKI, ERNEST G. WALLACE, JOSEPH F. BELFIORE, JR., CAROLYN BOLLING, HOWARD E. HURLEY, JR., JAMES MOTT, H.D. MORRIS, GEORGE A. RISCILI, and RAY ELBERT PARKER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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TABLE OF CONTENTS

Page

OPINION BELOW 2

JURISDICTION 2

QUESTION PRESENTED FOR REVIEW 2

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING A WRIT OF CERTIORARI. 8

I. The Virginia Supreme Court has Misconstrued the Equal Protection Clause of The Fourteenth Amendment 9

II. The Question Is A Matter of Importance to States Throughout the Country 18

CONCLUSION 21

APPENDIX:

Appendix A – Opinion of The Virginia Supreme Court 1a

Appendix B – Opinion of The Circuit Court of Arlington County. 14a

Appendix C – Judgment of Virginia Supreme Court 23a

Appendix D – Zoning Ordinance, Arlington County, §29D. 24a

Appendix E – United States Environmental Protection Agency letter dated November 18, 1974. . . . . .28a

TABLE OF AUTHORITIES

Cases:

Akron v. Davies, 111 Ohio App. 103, 170 N.E.2d 494 (1959) 19

Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) 10, 11

City of New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513 (1976) 12, 14, 17

Cases, continued: Page

Commonwealth v. Sargent, 330 Mass. 690, 117 N.E.2d (1953) 19

Detroit Police Officers Ass'n v. City of Detroit, 190 N.W.2d 97 (Mich. 1971), Appeal dismised for want of a substantial federal question, 405 U.S. 950, 92 S.Ct. 1173 . . . . . 20n

Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963) 14

Fishmen v. Massachusetts, Supreme Judicial Court of Massachusetts No. 729 (1977) 19

Funeral Directors Ass'n v. Groth, 202 Va. 792, 120 S.E.2d 467 (1961) 19

Georgetown Ass'n of Businessmen v. District of Columbia, D.C. Civ. Action Nos. 7242-76 19

Goreib v. Fox, 274 U.S. 603, 47 S.Ct. 675 (1927) 14

Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) 15

Markham Advertising Co. v. State, 73 Wash.2d 405, 439 P.2d 248 (1968), Appeal dismissed for want of substantial federal question, 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed.2d 512 (1969) 18n

Morey v. Doud, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 485 (1957) 13

Railway Express Agency v. New York, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949) 14

Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929) 14

South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974) 20

State v. Whisman, 24 Ohio Misc. 59, 263 N.E.2d 411 (1970) 19

Town of Leesburg v. Tavenner, 196 Va. 80, 82 S.E.2d 597 (1954) 19

Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974) 11, 12, 13, 17

Cases, continued: Page

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) 10, 11, 12

Whalen v. Roe, ___U.S. ___, 97 S.Ct. 869 (1977) 15

Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955) 14, 16

Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440 (1975) 11, 12, 13, 14, 17, 18n

Positive Law:

U.S. Constitution Fourteenth Amendment, Section 1 . . . . . *passim*

28 U.S.C. §1257(3) 2

Zoning Ordinance of Arlington County, §29D 2, 3, 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, BERT W. JOHNSON, County Manager, and ROY McLAREN, Chief of Police of Arlington County,

Petitioners,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioners, the governing body of Arlington County, Virginia, the County's chief administrative officer and its chief of police, ask that a writ of certiorari issue to review a judgment of the Supreme Court of Virginia invalidating one of the County's ordinances which classifies vehicles for purposes of parking for repugnance to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is reported at 217 Va. ___, 231 S.E.2d 231 and is appended to this petition, as Appendix A (pp. 1a-13a, *infra*). The letter opinion of the Circuit Court of Arlington County is not reported. It is appended to this petition as Appendix B (pp. 14a-22a, *infra*).

JURISDICTION

The judgment of the Supreme Court of Virginia (App. C, pp. 23a-24a, *infra*) was entered on January 14, 1977. This Court has jurisdiction under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Does a municipal ordinance restricting parking on the streets of residential neighborhoods by non-residents who have no purpose in the neighborhood except to use its streets for parking when those streets are crowded with parked cars violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "SECTION 1. . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Section 29.D of the Zoning Ordinance of Arlington County, Virginia, entitled "Restriction on Parking in Districts in Which Commercial and Industrial Uses Are Not Permitted." is set forth in Appendix D at pages 24a-28a, *infra*.

STATEMENT OF THE CASE

Arlington County, Virginia, is a small, densely populated community near the center of the metropolitan area of Washington, D.C. A county in name and in form, Arlington is otherwise like a suburban city, with approximately 157,000 residents living in its 25.75 square miles in 1975.

In Arlington, as in many other communities, there are residential neighborhoods that border or are very near intensely used commercial and industrial districts. Streets in these residential neighborhoods tend to be used heavily, for travel and even more for parking, by those who drive to and from their jobs in the nearby business districts. When the streets of such a neighborhood become overcrowded with cars parked by the commuters, that neighborhood has a special problem that is not shared by the average residential neighborhood. The cars parked in the usual residential neighborhood are parked there only because their drivers and passengers live or are visiting or have business in the neighborhood.

Arlington reacted to this special problem faced by some of its residential neighborhoods by adopting an amendment to its zoning ordinance authorizing the restriction of on-street parking in residential sections of the County where specified conditions of parking congestion obtain. The purposes of the amendatory ordinance were expressly stated in its preamble to be:

> "to reduce hazardous traffic conditions resulting from the use of streets within areas zoned for residential uses for the parking of vehicles by persons using districts zoned for commercial or industrial uses or the conditional uses allowed in Special Districts under the Zoning Ordinance of Arlington County; to protect those districts from polluted air, excessive noise, and trash and refuse

caused by the entry of such vehicles; to protect the residents of those districts from unreasonable burdens in gaining access to their residences; to preserve the character of those districts as residential districts; to promote efficiency in the maintenance of those streets in a clean and safe condition; to preserve the value of the property in those districts; and to preserve the safety of children and other pedestrians and traffic safety, and the peace, good order, comfort, convenience and welfare of the inhabitants of the County." (App. D, 25a.)

The County Manager is directed by the ordinance to determine the residential areas where on weekdays of any month more than 75 percent of the on-street parking capacity is used and at the same time more than 25 percent of such capacity is used by operators of vehicles whose destination is not the residential area itself but a commercial or industrial area. When the tests which establish these facts have been made, parking during weekday business hours is restricted to vehicles displaying permits and service and delivery vehicles. Permits are issued to residents of the neighborhood for their own cars licensed in the County, for cars or trucks of those doing business with them and, to a limited extent, for their visitors' cars. (App. D, 26a-27a).

The Arlington residential neighborhood where this parking permit ordinance was made effective is Aurora Highlands. That neighborhood is near U.S. Route 1, adjacent to a district of large office and commercial buildings called Crystal City. After the required survey, the County Manager designated a permit parking zone consisting of just a few streets in Aurora Highlands. The zone has 192 parking spaces along portions of three streets containing 101 residences in 81 buildings. On the occasion of the most thorough study, 188 of the 192 spaces were occupied, and the drivers and passengers of

156 of the parked vehicles were destined for Crystal City. All but two of the 81 residential buildings have driveways, but some of these had been added after the Crystal City-induced parking congestion began in the 1960's. (Va. Appendix, [1] pp. 371, 373, 383 and 385.)

An action challenging the constitutionality of the ordinance in its application in Aurora Highlands was brought by a group of commuters who worked in Crystal City, and most of them had been parking all day every working day on the residential streets of Aurora Highlands where the restriction was in effect. The commuters alleged that the ordinance, among other things, denied them the equal protection of the laws in violation of the Fourteenth Amendment. Their suit was brought in the Arlington County Circuit Court, which held a trial. Plaintiffs sought to show at the trial either that there were no such problems in Aurora Highlands as the ordinance was designed to counteract or that the problems were not caused by them and their fellow commuter parkers. (Va. Appendix, frequently throughout pp. 46-222.) Their evidence also went to the availability and cost of commercial parking near their jobs in Crystal City. (Va. Appendix, pp. 137-139.)

The County introduced evidence to demonstrate the rational basis for the legislative judgment that (1) problems of parking congestion caused by outsiders do exist in neighborhoods which have the amount of parking established as a prerequisite for the restrictions of the ordinance (as such problems are conceded to have existed in Aurora Highlands) and (2) that the resident parking permit plan is an appropriate way to deal with them.

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[1] Wherever the record in the Virginia Supreme Court is being referred to, it will be referred to as the Va. Appendix.

The County introduced the testimony of residents of the affected streets, land use planners, transportation planners, and experts on air quality. The evidence tended to show that, when streets became overcrowded with cars that are in the neighborhood only to park, there is more trash and refuse, more noise (especially in the early morning), more likelihood of conflicts between residents and parkers, more traffic and parking violations, more problems of street cleaning and trash collection, more difficulty for residents and their visitors getting in and out of driveways and finding places to park near their houses, a likelihood that residential streets may have to be rebuilt to the higher standards of streets in commercial areas, a threat to property values, a reduction in the desirability of the neighborhood as a place for residential and family values to be preserved and an aesthetic harm to the neighborhood. There was evidence that in Aurora Highlands these problems were reduced by a reduction in the number of cars from outside parked on the streets. (Va. Appendix, p. 347 for example.) Environmental and transportation experts expressed their opinions that an appropriate way to reduce air pollution is to reduce the number of vehicle miles travelled and a way to do this is to encourage the use of mass transit facilities and discourage the use of cars for commuting by restricting the supply of free parking near areas to which many persons commute. At the time of the trial a proposed Environmental Protection Agency order would have required the County to control parking, and the ordinance had been conditionally approved as a method of meeting the EPA requirement. (Va. Appendix, pp. 256-293 and Defendant's Exhibit #1, App. E.)

The County's position was that the ordinance had worked and would continue to achieve its goals. This was illustrated in part by the testimony of one of the residents of the affected streets, a service station

operator, who told about the problems caused by the excessive parking, the flood of trash and damage to vehicles caused by vehicles squeezing into tight spaces, saying at the time of trial:

> "You'd have to be down there constantly every day to see just what it was like. It was bumper to bumper. You could hardly get in and out of the driveways. The neighbors really seemed upset, to tell you the truth. There was a lot of tension in the neighborhood because of this. You know, the streets were a lot dirtier then." (Va. Appendix, pp. 340-41.)

When asked about the effect of the restriction, he said:

> "Well, miraculously they're clear. You don't have the congestion that you did. They're cleaner. It's quieter. You don't hear them coming in the morning like you did . . .
>
> "You don't see as many cigarette butts and the like on the streets. It's a lot cleaner, a lot quieter, and I notice that the neighbors seem to be all getting along better. This is kind of like somebody has released all the pressure." (Va. Appendix, p. 347.)

While reciting that it had "had the benefit of the testimony of transportation experts, planners, ecologists, a representative of the Environmental Protection Agency as well as others," the trial court made no findings on any of the points at issue except as to the adequacy of parking facilities at Crystal City. (App. B, p. 15a.) It concluded broadly that the evidence did not show that the classification made by the ordinance, which it described as the creation of two classes—"those who reside in the permit area, and those who do not"—bears any reasonable relationship to the stated objectives of the ordinance." which it termed "laud[able]." (App. B, p. 21a.) That bare conclusion, unsupported by any intermediate findings, led the court to find violations of the due

process clauses of state and federal constitutions and of the Equal Protection Clause of the Federal Constitution. It enjoined enforcement of the ordinance. (App. B. p. 22a.)

On the County's appeal, the Virginia Supreme Court disregarded the evidentiary record and treated the question posed as one of law, that is to say as a question of facial validity. (App. A, p. 5a.) Its conclusion was that the objectives set forth in the statement of purpose of the ordinance clearly "constitute a legitimate governmental interest:" (App. A, 7a), but that in no circumstances could an ordinance that created a class consisting of residents and personal and business visitors to their neighborhood on the one hand, and a class of non-residents on the other be a valid means of furthering that legitimate interest because the classification does not bear the required "reasonable relation to those objectives" (App. A, p. 12a.) The court, so concluding, found it unnecessary to consider "arguments concerning 'special' legislation proscribed by . . . the *Va. Const.*, or those related to the due process and provileges and immunities clauses of the Constitution of the United States for [it] was of [the] opinion that this ordinance offends the equal protection clause of the 14th Amendment." and again that "the ordinance on its face offends the equal protection guarantee of the 14th Amendment." (App. A, pp. 5a-6a & 12a.) On that basis it affirmed the trial court's judgment.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the entire body of law that has grown up around this Court's application of the Equal Protection clause to economic and social legislation. It is important that the decision of the Virginia Supreme Court be reviewed (and reversed) because residents' parking permit ordinances generally

similar to Arlington's have been enacted or are being considered in many communities. Debate as to the wisdom (or the legality, under state law) of such ordinances should not be clouded by any question of their conformity with the United States Constitution when there is no such question.

1. To say that this Court has not decided the question which was decided below would be to show contempt for the process by which lawyers reason from the particulars of decided cases to general principles and then back to the particulars of a new case. The particulars of the Arlington County permit parking ordinance do not differ in their legal significance from the particulars of dozens of cases in which this Court has sustained economic or social legislation against challenges based on the Equal Protection Clause.

This does not mean that the Virginia Supreme Court did not cite the usual language of interpretation, because it said:

> "The 14th Amendment does not forbid classification in legislative enactments. Rather, it commands that classification be reasonably structured to serve a proper governmental interest. Classifications based upon race, national origin, and alienage are suspect and subject to strict judicial scrutiny and survive equal protection attacks only when designed to achieve an 'important', 'overriding', or 'compelling' governmental interest. [Citation omitted.] When the basis is not suspect, the classification is constitutionally permissible if the governmental objective is 'legitimate' and the classification bears a 'reasonable' or 'substantial' relation thereto.
>
> * * *
>
> "Classifications in municipal ordinances enjoy a presumption of validity, but that presumption may be 'overcome by unreasonableness apparent on the

face of the ordinance'. [Citation omitted.] Clearly the objectives stated here constitute a legitimate governmental interest." (App. A, pp. 6a-7a.)

The court even said that the method chosen to deal with the problem "may relieve the problem", but then made an ill-considered omission in the reasoning process and jumped to the conclusion that the classification amounted to invidious discrimination. This resulted in a failure to apply the principles of interpretation which it had quoted. If the Equal Protection Clause is to be applied this way in every case where it is in issue before the Virginia Supreme Court, then every new legislative classification in Virginia can be classified as invidious or not at the discretion of the state court and Virginians will be told that their legislative enactments violate the Federal Constitution on a different basis than has been established by this Court.

The long standing acceptance by this Court of regulations which try to create or preserve sanctuaries for residences when those regulations have been attacked as denying Equal Protection is the most obvious starting point for a lawyer who must determine the general principles which apply in this case. This is because the goals of the Arlington County ordinance are the same goals as have been approved in cases like *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L. Ed. 303 (1926) which approved the exclusion of industries and apartments from residential areas to keep them free of "disturbing noises," "increased traffic", and the hazards of "moving and parked automobiles" as well as to provide "children [with] the privilege of quiet and open spaces for play, *enjoyed by those in more favored localities.*" *Id.* at 394, 47 S.Ct. at 120-21. (Emphasis added.) *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954) was not a zoning case, but it recognized

that the police power included "the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully protected." *Id.* at 33, 75 S.Ct. at 102-03. The importance of this power has been more recently affirmed by the upholding of an ordinance restricting the number of unrelated persons who might live in a single family home because such ordinances by restricting, among other conditions, the number of cars which pass through a neighborhood and park there, create a "sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974) A fair-minded observer ought to be able to reason that if a distinction between persons who are related by blood or marriage and those who are not can be made without invidiously discriminating, then a distinction between persons who are parking on streets to go to the residences abutting on those streets and persons who are merely using those streets as parking lots and proceeding to non-residential land use activities is equally free from invidious discrimination.

The Court's recognition that "a reasonable margin to insure effective enforcement, will not put on a law, otherwise valid, the stamp of invalidity" stated in *Euclid v. Ambler, supra* at 388, 47 S.Ct. at 118, was also reaffirmed by *Village of Belle Terre v. Boraas, supra.* This principle should give reader of the case additional confidence that a legislative body may make classifications in light of practical realities. Then too, Mr. Justice Powell's concurring opinion in *Young v. American Mini Theatres, Inc.* 427 U.S. 50, 96 S.Ct. 2440 (1976) (quoting with approval Mr. Justice Marshall's dissent in *Village of Belle Terre, supra*) makes it clear that the Court will not find that debatable or controversial classifications are prohibited by the Equal Protection Clause when those classifications have been created to protect the quality of life in residential areas and do

not have any basis in such categories as race, indigency or alienage:

> "Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values. While I agree with respondents that no aspect of the police power enjoys immunity from searching Constitutional scrutiny, it also is undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.' *Village of Belle Terre v. Boraas,* [Citation omitted.] (Marshall. J. dissenting)." *Young v. American Mini Theatres Inc. supra* at 80, 96 S.Ct. 2440, 2457 (Powell, J. concurring).

Just last term, the Court considered the particulars of another case which helps to determine how the Equal Protection Clause is being applied, and reaffirmed the guiding principle of deference to legislative judgment in drawing lines separating one class from another. In *City of New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S. Ct. 2513, 2516-17 (1976), the Court said:

> "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."

The holding of the case is as significant as the foregoing statement of the governing principle. The Court sustained a New Orleans ordinance that, by a grandfather clause, gave two long-time pushcart operators a monopoly of the pushcart business in the French Quarter. In doing so, the Court overruled *Morey v. Doud,* 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 485 (1957), the only case in decades in which the Court has held that ordinary state or local legislation dealing with business affairs denied someone the Equal Protection of the laws.

If it is objected that the Arlington parking ordinance is not "local economic regulation" but something else, it ought to be enough to refer again to *Village of Belle Terre v. Boraas, supra,* where the issue was the validity under the Equal Protection Clause of an ordinance that limited the number of unrelated persons who could live together in a single family house. In deciding that there was no denial of Equal Protection, the Court included "social legislation" with the economic legislation that is the more usual subject of Equal Protection challenges which fail. It said that in the case of "economic and social legislation . . . legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' . . . and bears 'a rational relationship to a [permissible] state objective.' " *Id.* at 8, 94 S.Ct. at 1540. The purpose of the *Belle Terre* ordinance was similar to that of the Arlington ordinance, to preserve the quality of residential life by protecting, "[a] quiet place, where yards are wide, people are few, and motor vehicles restricted." *Id.* at 9, 94 S.Ct. at 1541. *Young v. American Mini Theatres, Inc. supra,* also sustained, against First Amendment and Equal Protection challenges, an ordinance that drew a line between so-called adult motion picture theaters and others and restricted where the

former could be operated. The prevailing opinion there did not treat the ordinance as economic regulation but said that "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect" and that "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 71, 96 S.Ct. at 2440. Neither the prevailing opinion nor the concurring opinion treat this as any different from economic regulation. In addition, the economic regulation in *City of New Orleans v. Dukes, supra,* is all but indistinguishable from regulations promoting the quality of life because it was presumed by the Court to reach its economic goal by enhancing the tourist-oriented charm of the French-Quarter of New Orleans *Id.* at 299, 96 S.Ct. at 2516.

The cases that stand for and apply the general standard of deference to rational legislative judgments about where to draw the line in regulating such matters as businesses, professions, living arrangements, buildings and motor vehicle traffic are numerous. See *Ferguson v. Skrupa,* 372 U.S. 726, 732, 83 S.Ct. 1028, 1032, 10 L.Ed.2d 93 (1963), *Williamson v. Lee Optical Co.,* 348 U.S. 483, 488-490, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955); *Gorieb v. Fox,* 274 U.S. 603, 607, 47 S.Ct. 675, 676 (192).

The motor vehicle is a frequent object of such remedial legislation. "The use of the automobile as an instrument of transportation is peculiarly the subject of regulation." *Silver v. Silver,* 280 U.S. 117, 122, 50 S.Ct. 57, 58, 74 L.Ed. 221 (1929). The Court has been deferential to legislative judgments embodied in such regulation. In *Railway Express Agency v. New York,* 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949), a New York City ordinance prohibiting the operation of vehicles carrying advertising other than of the vehicle operator's own wares was upheld on the theory that it was a traffic safety

measure. In rejecting an Equal Protection challenge, the Court accepted New York's traffic-safety justification of its ordinance and a further assumption that a rational legislative judgment might have been made that general advertising on a delivery truck was more distracting to other motorists and pedestrians and therefore more of a traffic hazard than advertisements of one's own wares.

The Arlington ordinance deals in a realistic, not fanciful, way with an admittedly serious problem, and it does not leave its purpose to conjecture. The problem is a particular aspect of the general problem of motor vehicle traffic congestion. The evils that result from allowing residential neighborhoods to be burdened with commuter parking are set out in the ordinance. The Virginia Supreme Court concluded, as it must, that eliminating these evils was a legitimate governmental objective. (App. A, p. 7a.) It is self-evident that prohibiting commuter parking is rationally calculated to achieve that objective. Arlington proved at trial the rational relationship of the means to the end, though the point scarcely needed proof, and it proved also that the ordinance had worked, though such proof is by no means essential to the validity of the ordinance. As for the commuters' evidence at trial, even if they showed that the ordinance had been a failure, that it was wholly unnecessary—which they did not—such a showing would be relevant, as this Court indicated just the other day, only if *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), were still good law. In *Whalen v. Roe,* ___U.S. ___, ___, 97 S.Ct. 869, 875, (1977) the Court said that, contrary to the holding of *Lochner,* "State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part."

The court below saw only a general parking problem as the object of concern in the Arlington ordinance. It said:

> "Local governments have a legitimate interest in regulating the cause of the manifold problems which result from parking congestion. But the cause of such problems is the use of public streets by motorists in general, wherever they live or work. A regulation which treats the cause by favoring the motorists who happen to reside along a public street at the expense of those who live elsewhere may relieve the problems, but solutions achieved at the price of invidious discrimination are too dear." (App. A, 11a-12a.)

This view of the problem has led the Virginia Court to ignore the permissibility of a step-by-step approach. If the Arlington ordinance is seen as one which attacks the general problem of parking congestion, it would not be a Constitutional objection that it deals with only one class of parkers. *Williamson v. Lee Optical of Oklahoma, supra* at 489, 75 S.Ct. at 465. The legislature could conclude that the phase of the problem of parking congestion it wished to attack first was the particular problem of congestion found only where residential neighborhoods have been overcrowded with parked cars from outside the neighborhood. If the problem is not seen as the general problem of parking congestion, then it is not necessary here to invoke such cases as these sustaining the Constitutionality of dealing with one cause of a problem at a time. The problem sought to be resolved by the Arlington ordinance can be seen as a problem special to residential neighborhoods affected by commuter parking. The Arlington ordinance does not need to be read as one concerned with congestion generally or with all kinds of congestion. Rational legislative responses to the multiple problems of traffic and parking congestion will of course vary with areas and circumstances. In business districts,

for example, limited-time parking enforced by parking meters, along with bus zones, taxi zones and loading zones may be the appropriate response.

When a residential neighborhood is subject to being crowded by cars from outside, there are, broadly, only three choices for the responsible governing body; (1) to leave parking unrestricted with the risk that the quality of the neighborhood residents' life will be degraded; (2) to restrict all parking and by doing so put a new burden on those using the residential area itself—a burden the ordinary residential area does not have and a burden that could destroy neighborhoods whose residences have no driveways or garages; or (3) to restrict parking and except from the restriction vehicles that are parked on the streets in connection with the use of property abutting on the streets where the restriction is in effect.

There is no guidance given by any reported case which shows how the third solution works an "invidious discrimination." The commuter has no right to park all day every business day in any residential district. Those excepted from the restriction are those who most need to use residential streets for parking, just as taxis, buses and trucks need to use taxi zones, bus stops, and loading zones—or just as those who have a special need to park on the streets around the Capitol and the building that houses this Court, may park there by permit to the exclusion of others. For most of us, free parking on a street convenient to our jobs is not seen as a right and rarely reaches the level of a reasonable expectation. Such a "right" cannot be seriously compared with the "fundamental personal rights" mentioned in *City of New Orleans v. Dukes, supra* or the First Amendment rights of speech and association raised by the litigants in *Young* and *Belle Terre*. Just as state statutes may permit highway billboards to advertise businesses located in the

neighborhood but not elsewhere,[2] so also there is nothing inherently "invidious'. in a classification that permits parking on the streets of a neighborhood when the person parking is using that neighborhood but forbids parking on the streets of a neighborhood when the destination of the person parking is elsewhere. It is not remotely like "suspect classifications such as race, religion, or alienage." that the Court recognized in *Dukes* may call for stricter than usual equal protection scrutiny.

2. Many communities throughout the country have acted or are considering acting as Arlington has to protect some of their residents from the threats to their health, safety, comfort, convenience and dignity that are posed by having cars jammed into the parking places in front of their houses all day every working day. Counsel for petitioners know of similar ordinances in Boston and Cambridge, Massachusetts; Wilmington, Delaware; San Francisco, California; Montgomery County, Maryland; Richmond and Charlottesville, Virginia; and the District of Columbia. The Cambridge and District of Columbia ordinances are the subject of judicial challenges comparable to the Crystal City commuters' complaint in this case. The Cambridge case is pending on appeal to the Supreme

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[2] *Markham Advertising Co. v. State*, 71 Wash. 2d 405, 439 P.2d 248 (1968) appeal dismissed for want of a substantial federal question 393 U.S. 316, 89 S.Ct.553, 21 L.Ed.512 (1969), where the Washington court said:

> "A factual distinction exists between signs advertising activities conducted on the premises and signs advertising activities being conducted off-premises, because on-premises signs are part of the on-premises business not otherwise related to activities conducted on the land." *Id.* 439 P.2d at 256.

Young v. American Mini Theatres, Inc. supra at 68, 96 S.Ct. at 2440 cites *Markham* as authority for its acceptance of the classification distinguishing advertising of businesses in the neighborhood of the sign and those elsewhere.

Judicial Court of Massachusetts from a decision upholding the ordinance. *Fishman v. Massachusetts*, No. 729. In the District of Columbia litigation, a judge of the Superior Court has issued a preliminary injunction against residents' permit parking in Georgetown and surrounding neighborhoods. *Georgetown Ass'n of Businessmen v. District of Columbia*, Civ. Action Nos. 7242-76 et al. In the only other reported decision of which we are aware, a common pleas court in Ohio invalidated a residential parking ordinance with some points which are comparable to Arlington's. *State v. Whisman*, 24 Ohio Misc. 59, 263 N.E.2d 411 (1970). Other kinds of parking classifications have been upheld, although the Virginia Supreme Court did not find helpful the cases of *Akron v. Davies*, 111 Ohio App. 103, 170 N.E.2d 494 (1959), which upheld a prohibition on on-street parking around public buildings by all except publicly owned vehicles; *Commonwealth v. Sargent*, 330 Mass. 690, 117 N.E.2d 154 (1953), which upheld an on-street parking prohibition in the area of the State Capitol for all except members of the state legislature; *Town of Leesburg v. Tavenner*, 196 Va. 80, 82 S.E.2d 597 (1954), which upheld a prohibition of on-street parking for all except common carriers and commercial vehicles; and *Funeral Directors Ass'n v. Groth*, 202 Va. 792, 120 S.E.2d 467 (1961), which upheld a prohibition of on-street parking during funerals for all but those participating in the funerals. The classifications of these cases were distinguished because "in none was the classification based upon residence". (This is the kind of specious differentiation which is very disappointing to persons trying to interpret the Equal Protection Clause. There is no principle of interpretation which says "residence'. is a forbidden basis of classification.[3]) In each of the

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[3] In some cases concerning residence the decisions are very much to the contrary. For example, a requirement that city

[footnote continued]

foregoing cases, unlike the instant case, people other than government workers, legislators, funeral attendees, commercial vehicle operators and common carriers who also wished to park in the area because of the "activities conducted on the land" adjoining the streets on which they wished to park were prohibited from parking. Thus, the classification of the instant case is more inclusive than those of the cases distinguished by the lower court, because in the Arlington case all who use the residential area are permitted to park there.

A number of the current ordinances are like Arlington's in that they have been adopted or are being considered to some degree in response to Environmental Protection Agency plans to improve air quality by controlling automobile traffic. On review of such a plan for Metropolitan Boston, the Court of Appeals for the First Circuit considered a part of the plan that would ban on-street parking and restrict off-street parking during the morning commuting hours in the Boston core area. Quite to the contrary of the state courts of the District of Columbia, Ohio and Virginia, this federal court said that it approved the plan only on EPA's representation that residential parking spaces and certain other spaces were exempt from the on-street parking ban. In addition, the court said that off-street facilities could be separated between residential and commercial parkers so that the former could remain parked during the restricted hours. *South Terminal Corp. v. EPA*, 504 F.2d 646, 671-72 (1st Cir. 1974). Surely this federal court is correct in its judgment that a parking preference for residents is not

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employees and police officers maintain residences in the locality of their employment was upheld against an argument that it denied Equal Protection *Detroit Police Officers Ass'n v. City of Detroit*, 190 N.W.2d 97 (Mich. 1971) appeal dismissed for want of a substantial federal question 92 S.Ct. 1173.

only appropriate but may be necessary to make a parking restriction program reasonable, and the state court judges are wrong in believing that the United States Constitution prevents a local governing body from putting such a preference in a parking control plan.

CONCLUSION

The Arlington ordinance is a practical and down-to-earth solution to a hard problem, and it is easy to argue not only that it is a permissible classification, but that it is a wise one. The petition should be granted. As noted above, the Virginia Supreme Court treated the question before it as one of law to which the record made in the Circuit Court was irrelevant. We agree that the case may be decided based on the conceivable basis for the legislative action (although the case for the ordinance is given additional weight by the evidence actually presented at trial). Because there is one or more than one conceivable basis on which to uphold the ordinance without considering the evidence introduced at trial, this Court does not need to refer to any substantial record in

deciding the case. The authorities are familiar to the Court. In the circumstances we suggest to the Court that the appropriate disposition of the case may be summary reversal of the judgment below.

Respectfully submitted,

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APPENDIX

APPENDIX A

COUNTY BOARD OF ARLINGTON COUNTY et al.

v.

Rudolph A. RICHARDS et al.

Record No. 760056.

Supreme Court of Virginia.

Jan. 14, 1977.

Charles G. Flinn, Deputy County Atty. (Jerry K. Emrich, County Atty., on briefs), for appellants.

Herbert C. Harper, Fairfax (Ray Elbert Parker, pro se, on brief), for appellees.

Arlington Chamber of Commerce (Charles McDonnell Radigan, Barham, Radigan, Suiters & Brown, Arlington, on brief), amicus curiae, for appellants.

Before CARRICO, HARRISON, COCHRAN, HARMAN, POFF and COMPTON, JJ.

POFF, Justice.

Appellants[1] challenge the trial court's judgment declaring a county ordinance authorizing permit parking on certain public streets unconstitutional as applied to appellees.[2]

On May 18, 1974, County Board of Arlington County amended and reenacted § 29 D of its zoning ordinance. The preamble stated the legislative purpose to be:

> . . . to reduce hazardous traffic conditions resulting from the use of streets within areas zoned for residential uses for the parking of vehicles by persons using districts zoned for commercial or industrial uses or the Conditional Uses allowed in Special Districts under the Zoning Ordinance of Arlington County; to protect those districts from polluted air, excessive

1. County Board of Arlington County, Bert W. Johnson, County Manager of Arlington County, and Roy McLaren, Chief of Police of Arlington County.

2. Rudolph A. Richards, Mario A. Carboni, Frank Tomek, Thomas Beck, Braxton H. Tabb, Jr., Michelle McKenzie, Elmer P. Borkowski, Ernest G. Wallace, Joseph F. Belfiore, Jr., Carolyn Bolling, Howard E. Hurley, Jr., James Mott, H. D. Morris, George A. Riscili and Ray Elbert Parker.

> noise, and trash and refuse caused by the entry of such vehicles; to protect the residents of those districts from unreasonable burdens in gaining access to their residences; to preserve the character of those districts as residential districts; to promote efficiency in the maintenance of those streets in a clean and safe condition; to preserve the value of the property in those districts; and to preserve the safety of children and other pedestrians and traffic safety, and the peace, good order, comfort, convenience and welfare of the inhabitants of the County."

The county manager was empowered to implement § 29 D (hereinafter, the ordinance) in those residential areas in which he determined that "on the weekdays of any month" 75% of street parking capacity was filled and more than 25% of capacity was being occupied by "operators of vehicles . . . using districts in which commercial or industrial uses are permitted". In such residential areas, parking privileges were restricted to "service or delivery vehicles" and vehicles displaying permits. Parking permits were to be issued to "persons who are residents" of a restricted zone for "every vehicle owned by those persons and registered in the County"; "persons who are visitors of any residents"; and

"persons who do business with any residents". Parking violations were declared unlawful.

Aurora Highlands, a residential community consisting largely of single-family homes, is located along State Route 1 opposite "Crystal City", a complex of high rise office and commercial buildings where 20,000 workers are employed. Based upon an engineering study, the county manager designated a portion of Aurora Highlands as a permit parking zone. The zone embraced 81 buildings containing 101 residences and 192 parking spaces along portions of three streets. All but two of the single-family homes had off-street parking facilities.

Appellees were employed in Crystal City. Most commuted to work by automobile and parked on streets in Aurora Highlands. When the permit zone was established, they filed two motions against appellants seeking a declaratory judgment that the ordinance, as applied to them, denied them due process of law and equal protection of the laws, and praying for an injunction against its enforcement. The two motions were consolidated for trial, and the trial court, sitting without a jury, heard evidence *ore tenus*.

By final order entered September 16, 1975, incorporating a letter opinion dated

June 18, 1975, the trial court found that the classification bears no "reasonable relationship to the stated objectives", ruled that "the classification . . . is arbitrary and unreasonable", and declared that "the application of the ordinance to the petitioners is found to be violative" of their rights to due process and equal protection of the laws. The trial court decreed that appellants be "enjoined permanently from enforcing the provisions of . . . [the ordinance] against the petitioners".[3]

On brief, appellants posed the question: "Is the ordinance as it is applied to the appellees who are denied permits, a denial of due process . . . or . . . equal protection . . . ?" At bar, however, both parties agreed that the effect of the final order was to declare the classification arbitrary and the ordinance unconstitutional on its face, and we will consider the question in that posture.

We find it unnecessary to address arguments concerning "special" legislation proscribed by Article IV, § 14 of the Va.Const.,

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3. In the court below, the Board of Supervisors of Prince William County filed a brief *amicus curiae* in support of appellees but did not appear on appeal. Arlington Chamber of Commerce moved this Court for leave to file a brief *amicus curiae* in support of appellants, and we granted the motion.

or those related to the due process and privileges and immunities clauses of the Constitution of the United States, for we are of opinion that this ordinance offends the equal protection clause of the 14th Amendment.

[1–3] The 14th Amendment does not forbid classification in legislative enactments. Rather, it commands that classification be reasonably structured to serve a proper governmental interest. Classifications based upon race, national origin, and alienage are suspect and subject to strict judicial scrutiny, and survive equal protection attacks only when designed to achieve an "important", "overriding", or "compelling" governmental interest. *Sandiford v. Commonwealth*, 217 Va. 117, 225 S.E.2d 409 (1976). When the basis is not suspect, the classification is constitutionally permissible if the governmental objective is "legitimate" and the classification bears a "reasonable" or "substantial" relation thereto. This is true even when the basis of the classification involves First Amendment guarantees. *Young, Mayor of Detroit v. American Mini Theatres, Inc.*, — U.S. —, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *see also McWhorter v. Commonwealth*, 191 Va. 857, 63 S.E.2d 20 (1951).

The ordinance creates two classes, and we must first decide what they are. Appellants say they are two classes of vehicles. Some appellees view them as a government-employee class and a non-government-employee class. One appellee treats them on brief as a property-owner class and a non-property-owner class. In our view, the ordinance creates one class consisting of residents of a defined zone who own automobiles registered in the county and persons who are visitors of or do business with such residents, and another class consisting of all other persons.

[4, 5] Hence, it appears from the face of the ordinance that the crucial basis of the classification is residence in a selected area. Classifications in municipal ordinances enjoy a presumption of validity, but that presumption may be "overcome by unreasonableness apparent on the face of the ordinance". *Kisley v. City of Falls Church*, 212 Va. 693, 697, 187 S.E.2d 168, 171 (1972). Clearly, the objectives stated here constitute a legitimate governmental interest. The question, then, is whether the classification bears a reasonable relation to those objectives.

Defending the ordinance, appellants cite two Virginia cases and several cases in other jurisdictions upholding ordinances regulating parking on public streets. *Town of Leesburg v. Tavenner*, 196 Va. 80, 82 S.E.2d

597 (1954) (parking zone restricted to all but common carriers and commercial vehicles); *Funeral Directors' Ass'n v. Groth*, 202 Va. 792, 120 S.E.2d 467 (1961) (parking forbidden during funerals); *Akron v. Davies*, 111 Ohio App. 103, 170 N.E.2d 494 (1959) (street parking around public buildings limited to public vehicles); *Commonwealth v. Sargent*, 330 Mass. 690, 117 N.E.2d 154 (1953) (parking by legislators permitted in no-parking zones).

We do not find the Virginia cases controlling or the other cases helpful. In each, the classification was sustained, but in none was the classification based upon residence. Nor is the decision in *State v. Rush*, 324 A.2d 748 (Me.1974) relevant to our determination of the validity of the classification here, for there the ordinance prohibiting overnight parking treated motorists as a single class.

[6] In response to appellees' argument that the objectives of the ordinance could be better achieved by other parking regulations applied to motorists as a single class, appellants say that they are not required to select the optimum solution to a public problem. It is true that a legislative body is not required to choose "the least restrictive alternative" except when "state action impinges on the exercise of fundamental

constitutional rights or liberties", *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 51, 93 S.Ct. 1278, 1306, 36 L.Ed.2d 16 (1973), but it is never free to adopt an alternative so restrictive that it violates rights secured by the equal protection clause.

[7] Appellants rely, in part, upon general authority delegated to local governments under the zoning statutes. They argue that "many of the goals of Article 8, Chapter 11 of Title 15.1 are more effectively promoted by the parking regulation than by some other use regulation." Whatever authority local governments may derive from the zoning statutes to protect the distinctive characteristics of residential neighborhoods, such authority does not include the power to adopt ordinances which grant residents a parking monopoly in the public streets of their neighborhood.

[8–10] An owner of property abutting a public street has the right of ingress and egress and "the right to use the street as one of the public". *Nusbaum v. Norfolk*, 151 Va. 801, 805, 145 S.E. 257, 259 (1928). But ownership of such property gives the owner no right to the use of the street superior to that enjoyed by the public at large.

> "The right to park in a public street is not a right incident to the ownership of

> abutting land but rather one which is incident to the use of the street for travel and which is shared by the property owner in common with all other members of the traveling public." *Brown v. Jackson*, 268 Or. 111, 113, 519 P.2d 87, 88 (1974).

Cf. Town of Leesburg v. Tavenner, supra, 196 Va. at 85, 82 S.E.2d at 600, where we held that "[t]he fact that specific zones are designated on a public street for the loading and unloading of passengers by common carriers does not render the ordinance unreasonable or discriminatory as to owners of property or private enterprises adjacent to such areas." *See also* 7 Am.Jur.2d *Automobiles and Highway Traffic* § 240 (1963).

Necessarily, the parking privileges of residents are no greater than those of property owners. Nor is a resident's privilege inferior to that of the public at large.[4] The classification at bar cannot, therefore, be sustained on the theory that it protects different rights or privileges of the classes it creates.

The court in *State v. Whisman*, 24 Ohio Misc. 59, 263 N.E.2d 411 (1970) considered

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4. In *Kaufman v. West*, 133 Wash. 192, 233 P. 321 (1925), the court invalidated as discriminatory an ordinance which prohibited owners, occupants, visitors, and employees of an apartment house from parking across the street adjacent to the building.

an equal protection challenge to a permit parking ordinance much like the one at bar. There, upon a finding that "an extreme parking problem exists for the residents of" two streets in New Boston, the ordinance provided that parking be prohibited within a designated zone except by permit. A city official was instructed to issue permits to "bona fide residents" of the zone "who own or operate a motor vehicle" and, on a space-available basis, to "residents of the City of New Boston". Delivery vehicles "loading and unloading" in the zone were exempt, and "limited permits" were authorized "for visitors to the homes" located in the zone. The ordinance fixed a fine for parking violations.

Unlike the classification before us, the classification in *Whisman* did not grant the parking privilege to residents of the restricted zone to the exclusion of other residents of New Boston. Yet, the court found that "it absolutely discriminates against all persons who are not residents of New Boston", that "no valid justification for the classification exists", and that the ordinance "merely grants a parking right to residents in contravention of the well established rights of the general public." *Id.*, 24 Ohio Misc. at 65, 263 N.E.2d at 415.

Local governments have a legitimate interest in regulating the cause of the mani-

fold problems which result from parking congestion. But the cause of such problems is the use of public streets by motorists in general, wherever they live or work. A regulation which treats the cause by favoring motorists who happen to reside along a public street at the expense of those who live elsewhere may relieve the problems, but solutions achieved at the price of invidious discrimination are too dear.

We agree with the trial court that the classification created by this ordinance bears no reasonable relation to its stated objectives, and we hold that the ordinance on its face offends the equal protection guarantee of the 14th Amendment.

We do not condemn all permit parking ordinances. The one at bar was not enacted under authority of Code § 46.1–252.01 (Repl.Vol.1974). That statute empowers local governing bodies "to provide for the issuance of permits for motor vehicles parking on public streets" and to set the "rates" and fix the "term[s]" of such permits. In setting permit "rates", local governments are authorized to "differentiate" between two classes of motor vehicles, *viz.*, "motor vehicles upon which a license fee is paid to the political subdivision issuing such permit and other motor vehicles." Significantly, the statute does not allow local governments to deny permits to nonresidents.

Code § 46.1–252.01 is not in issue here, and we express no opinion upon its validity or the validity of an ordinance enacted pursuant thereto. Our decision affects only parking permit ordinances, such as that here, which create classifications not reasonably related to legitimate governmental objectives.

Affirmed.

APPENDIX B

CIRCUIT COURT OF ARLINGTON COUNTY
VIRGINIA

June 18, 1975

Charles G. Flinn, Esquire
Assistant Commonwealth Attorney
Arlington County
Arlington, Virginia 22201

Herbert C. Harper, Esquire
4085 Chain Bridge Road
Fairfax, Virginia 22030

Ray Elbert Parker, Esquire
7702 Schelhorn Road
Alexandria, Virginia 22306

Re: Parker v. Wholey, In Chancery No. 24527
Richards v. County Board, In Chancery No. 24659

Gentlemen:

The County Board of Arlington County enacted Sec. 29-D of its zoning ordinance to deal with parking problems in certain residential areas. In doing this the governing body stated its objectives in the preamble to the ordinance. They are to reduce hazardous traffic conditions, to protect from pollution, excessive noise, and the throwing of trash and refuse from vehicles, to protect residents from unreasonable burdens in gaining access to their residences, to preserve the residential character of the district, to promote the maintenance of the streets in a clean and safe condition, to preserve property values, to preserve the safety of children, pedestrians and traffic safety and in general to promote the peace, good order, comfort, convenience and welfare of the inhabitants of the county. The ordinance then provides that parking may be restricted to the residents

of the residential area who hold parking permits when the County Manager, or his designee, has found that the conditions stated in Paragraph 1 of Sec. 29D have been found to exist. Briefly stated it requires a finding that twenty-five percent of the parking spaces in the residential area are being used by vehicles whose operators are then using a commercial or industrial area and that the total number of spaces used by any vehicles exceeds seventy-five percent of the parking spaces on such streets. A study was made and the condition which permits the ordinance to be utilized was found to exist.

In passing it should be noted that the residential area involved here is a part of the South Arlington community of Aurora Highlands. In this area there are 101 residences including a thirteen unit apartment and eighty eight duplexes or single family homes. There were 103 permits issued which came from applicants living in sixty-nine of the dwelling units. No requests were made for permits by the occupants of thirty-two of the dwelling units. Of the single-family dwelling units there was evidence that all but two of them have off-street parking.

The commercial area involved is Crystal City. Although not yet complete, there are over 20,000 persons who work there. Many of them use public transportation. Most of the petitioners in this case, however, arrive at their work at seven o'clock in the morning and come from places where the use of public transportation at that time is not feasible. There is some parking in the office buildings, but it is not adequate to meet the needs of those who work there and it is not designed or intended to be adequate. In the general area of Crystal City are also the National Airport, motels and commercial development, the Potomac Yards and the county dump.

The dispute between the commuters and the neighborhood residents had been of long standing and the subject of litigation in both the Federal and state courts.

The petitioners contend in this case that the ordinance is unconstitutional under both the state and Federal constitutions in that it abridges their privileges and immunities as citizens of the United States, denies them their liberty or property without the due process of law, and denies to them the equal protection of the laws.

The County contends that it may make such classifications as it pleases so long as they have some rational basis, unless the classifications are in the area of "strict scrutiny", *viz.*, race, voting rights, sex, residence, or economic status, where they then become "suspect". Further, the County says that the validity of its action does not depend upon a showing of the presence of some compelling governmental interest.

In reaching its decision, the Court will briefly review the principal cases cited by counsel in their briefs and in oral argument.

In the case of *Village of Belle Terre v. Boraas, 416 U.S. 1, 94, S.Ct. 536,* (1974) the Supreme Court of the United States upheld the validity of a zoning ordinance which defined the word "family" to exclude communes. In deciding the case the Court found no procedural disparity inflicted on some but not on others, and found that the case involved no "fundamental" right guaranteed by the constitution.

> "We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' . . . and bears a 'rational relationship to a [permissible] state objective' ". p. 1540 of 94 S.Ct.

The Virginia case of *Thompson v. Smith,* 155 Va. 367, recognized the right of the citizen to travel on the public highways and to transport his property on them to be a common right entitled to constitutional protection.

> "The exercise of such a common right the city may, under its police power, regulate in the interest of the public safety and welfare; but it may not arbitrarily or unreasonably prohibit or restrict it, nor may it permit one to exercise it and refuse to permit another of like qualifications, under like conditions and circumstances, to exercise it." p. 378 of 155 Va.

The Virginia Supreme Court has defined the difference between special and general legislation and has upheld legislation which it found to be general, although it applied only to a numerically small class of persons, "provided the classification itself be a reasonable and not an arbitrary one, and the law be made to apply to all of the persons belonging to the class without distinction." *Farmer v. Christian,* 154 Va. 48, 53.

> "A law is 'special' in a constitutional sense when by force of an inherent limitation it arbitrarily separates some persons, places or things from those upon which, but for such separation, it would operate." *Farmer v. Christian,* supra, 54.

The Court in *Farmer* pointed out that a useful guide is to look to the underlying reason for the limitation.

> "It follows, therefore, that if a law bears on its face no evidence of an exclusive or discriminative purpose, it is *prima facie* valid. . . . 'The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes that makes it special. . . . If the only limitation contained in a law is a legislative classification of its objects, it is a general law.' " *Farmer v. Christian, supra,* p. 55.

Although the Court in *Farmer* was dealing with the validity of legislation under the Virginia Constitution as general rather than special, the reasoning used by the Court is analogous to that employed by courts in

determining the reasonableness of classifications in the equal protection sense.

Richmond Funeral Directors v. Groth, 202 Va. 792, was a mandamus proceeding to compel the city's director of public safety to reinstate certain regulations which had previously been promulgated relating to the restricting of parking where funerals were being conducted.

> "It is fundamental that streets and highways belong to the public. Subject only to the limitation that constitutional rights must not be invaded, supreme control over the streets and highways is vested in the state, which, acting under its police power and through the legislature, may prescribe reasonable restrictions and regulations for their use.
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> * * *
>
> "This power of the state over the streets and highways may lawfully be delegated to local governing bodies, and when so delegated, may be exercised by such bodies to the full extent of the power conferred.
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> * * *
>
> "It is immaterial that property owners might be temporarily deprived of their privilege to park, or that those conducting and attending funerals might be benefitted. These effects are merely incidental to a valid exercise of police power by the municipality." *Richmond Funeral Directors v. Groth, supra*, pp. 795, 796.

Although the validity of the regulations was not before the Supreme Court in the *Funeral Directors* case, it pointed to an earlier holding in a case where it had dealt with the validity of a parking ordinance, *viz.*, *Town of Leesburg v. Tavenner*, 196 Va. 80. In *Tavenner* the Court sustained an ordinance which prohibited all parking within a certain distance of an intersection. The ordinance permitted common carriers to take on or

discharge passengers there and other vehicles to load or unload freight or merchandise. The attack on the ordinance was made by an abutting landowner, who failed when it was held that his right was subordinate to that of the town's to so control the use of the streets as to promote the safety, comfort, health, and general welfare of the public. In sustaining the validity of the ordinance, the Court found that the classifications were natural, reasonable, and appropriate to the purposes sought to be accomplished. *Town of Leesburg v. Tavenner, supra*, at p. 84.

> "The ordinance is not discriminatory within the class to which the parking privileges are granted for it gives the same rights to all common carriers. The fact that specific zones are designated on a public street for the loading and unloading of passengers by common carriers does not render the ordinance unreasonable or discriminatory as to owners of property or private enterprises adjacent to such areas. The time limit fixed for the common carriers to park for such purpose is reasonable, and the permitted use in the interest of the public." p. 85 of 196 Va.

A case cited to the Court which was decided in 1925 in the Supreme Court of the State of Washington shows that the sometimes rough treatment which the automobile receives in legislative bodies is nothing new. It is the case of *Kaufman v. West*, 233 P. 321. There an ordinance made it unlawful for any owner, occupant or visitor of any apartment house or the servant or employee of any of the foregoing to park his automobile on any street adjacent to an apartment house, except "adjacent to and on the same side of the thoroughfare . . . to which said apartment house is or shall be appurtenant." The Court found the ordinance to be plainly violative of the privileges and immunities clause of its state's constitution.

> "It is . . . discriminatory in that it does not operate alike on all persons and property under the same circumstances and conditions, and is therefore class legislation in discriminating against some and favoring others." 233 P.321, 322.

The case of *State of Maine v. Rush*, 324 A.2d 748, (Sup. Jud. Ct. of Me., 1974) was an appeal from a conviction of the violation of a parking ordinance in the city of Portland. The ordinance prohibited the parking of any motor vehicle on any street for longer than thirty minutes between the hours of two o'clock A.M. and six o'clock A.M. except for physicians or others on emergency calls. The defendant conceded the authority to enact the ordinance but asserted that the public protection gained was not equally available to all resident tenants in the city. His contention was that the application of the ordinance to him was so burdensome as to become discriminatory. The ordinance made no classifications and was applicable to all.

The *Rush* case and the *Belle Terre* case were argued to stand for the principle that (1) so long as the legislative objective is legitimate, (2) the means employed appropriate, and (3) the manner of exercising the power not unduly arbitrary, then a governing body may discriminate in making its classifications unless it is operating in the "sensitive" areas of race, religion, sex, etc. That appears to be an over-simplification, for in *Rush* the Court said:

> "Although variously expressed, it is established that the requirements of due process exact that the law shall not be unreasonable, arbitrary or capricious and that the state's police power can be properly exercised only when there is a reasonable relationship to the public health, safety, morals, or welfare." 324 A.2d 752.

The case of *State v. Whisman*, 263 N.E.2d 411, is interesting in that it is the only case which could be found dealing with the subject of parking permits. It was decided in a Court of Common Pleas in Ohio, a trial court which was exercising its appellate jurisdiction from a mayor's court. The ordinance which was under scrutiny prohibited the parking of vehicles on a certain street. It further provided for the issuance of parking permits to vehicle owners who resided on that street and if there were spaces to spare then other residents of the town could get them. The Court found that no valid justification for the classification existed and declared the ordinance unconstitutional.

A review of these authorities indicates that the two ordinances which attempted to restrict parking based on the residence of the car's owner have met unhappy endings in the courts. Those ordinances were not as carefully drawn as the one here, but their purpose was to create two classes of people and to favor one at the expense of the other. In the *Whisman* case if one did not live on Stanton Street, he got no parking permit. In *Kaufman*, if one lived or visited or worked in an apartment, he couldn't park across the street.

In this case the Court has had the benefit of the testimony of transportation experts, planners, ecologists, a representative of the Environmental Protection Agency as well as others. The ordinance's preamble sets forth laudatory objectives. The evidence in the case, however, does not show that the classification made bears any reasonable relationship to the stated objectives. The classification to be valid must not be arbitrary or capricious and it must be reasonable. The classification made in this ordinance creates two classes, i.e., those who reside in the permit area, and those who do not. The place of residence of the owner of a motor vehicle or his

place of employment have nothing to do with the traffic conditions, pollution, noise, trash and refuse thrown from vehicles, access to one's residence, the cleanliness and safety of the streets, property values, the safety of children or pedestrians, or the general welfare of the people of Arlington. The Court therefore concludes that the classification made here is arbitrary and unreasonable.

For the foregoing reasons the application of the ordinance to the petitioners is found to be violative of their rights under the due process clauses of both the state and Federal constitutions as well as a denial of the equal protection of the laws secured under the Federal constitution.

A question was raised at oral argument of the status of petitioners Borkowski and Richards to question the validity of the ordinance. Both have standing although neither used the permit zone before it became restricted.

Counsel should prepare a decree in the consolidated case incorporating therein by reference this letter memorandum, dissolving the temporary injunction and granting the petitioners relief.

Very truly yours,

/s/William L. Winston
William L. Winston
Judge

WLW:kw

APPENDIX C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 14th *day of* January, 1977.

County Board of Arlington County, Bert W. Johnson, County Manager of Arlington County, and Roy McLaren, Chief of Police of Arlington County, — Appellants,

against Record No. 760056

Rudolph A. Richards, Mario A. Carboni, Thomas Beck, Braxton H. Tabb, Jr., Michelle McKenzie, Elmer P. Borkowski, Ernest G. Wallace, Joseph F. Belfiore, Jr., Carolyn Bolling, Howard E. Hurley, Jr., James Mott, H. D. Morris, George A. Riscili and Ray Elbert Parker, — Appellees.

Upon an appeal from final orders entered by the Circuit Court of Arlington County on the 16th day of September, 1975.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the orders aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the orders appealed from. It is therefore adjudged, ordered and decreed that the said orders be, and the same are hereby, affirmed, and that the appellants pay to the appellees thirty dollars damages, and also their costs by them expended about their defense herein.

Which is ordered to be certified to the said circuit court.

A Copy,

Teste:

/s/ H.G. Turner
Clerk

Appellees' costs:

Attorney's fee	$50.00
Cost of printing briefs not to exceed $200 for each appellee—Code, § 14.1-182	?

Teste:

/s/ H.G. Turner

Clerk

APPENDIX D

May 18, 1974

AMENDMENT AND REENACTMENT OF SECTION 29, ZONING ORDINANCE, RE STREET PARKING IN RESIDENTIAL DISTRICTS.

On motion by Mrs. Bozman, seconded by Mr. Purdy and carried by a vote of 4 to 0, Mr. Fisher having left the meeting, voting recorded as follows: WHOLEY—AYE; BOZMAN—AYE; MUNSEY—AYE; PURDY—AYE; the Board adopted the following amendment and reenactment of Section 29 of the Zoning Ordinance as contained in the Appendix of the Arlington County Code, to create new Subsection D, relative to restricting street parking in districts in which commercial and industrial uses are not permitted:

The County Board of Arlington County, Virginia, hereby ordains that in order to reduce hazardous traffic conditions resulting from the use of streets within areas zoned for residential uses for the parking of vehicles by persons using districts zoned for commercial or industrial uses or the Conditional Uses allowed it. Special Districts under the Zoning Ordinance of Arlington County; to protect those districts from polluted air, excessive noise, and trash and refuse caused by the entry of such vehicles; to protect the residents of those districts from unreasonable burdens in gaining access to their residences; to preserve the character of those districts as residential districts; to promote efficiency in the maintenance of those streets in a clean and safe condition; to preserve the value of the property in those districts; and to preserve the safety of children and other pedestrians and traffic safety, and the peace, 'good order, comfort, convenience and welfare of the inhabitants of the County,

Section 29D of the Zoning Ordinance is enacted as follows:

D. RESTRICTIONS ON PARKING IN DISTRICTS IN WHICH COMMERCIAL AND INDUSTRIAL USES ARE NOT PERMITTED.

1. Whenever the County Manager or his designee shall determine that the streets of a particular district or discrete portion of a district in which residential uses are permitted and commercial and industrial uses are not permitted, except transitional uses or by conditional use permit, are being used for parking by the operators of vehicles while the operators of those vehicles are using districts in which commercial or industrial uses are permitted or portions of districts in which Conditional Special Uses have been permitted under Section 3.A.9.a-c. of the Zoning Ordinance and the average number of vehicles parking in such a manner is in excess

of 25% of the number of parking spaces on such streets and the total number of spaces actually occupied by any vehicles exceeds 75% of the number of spaces on such streets on the weekdays of any month, as disclosed by an engineering study, the County Manager or his designee shall prohibit parking during the hours when such use has been found on those streets of those districts or portions of districts found by the survey to have been so affected. In such cases the County Manager shall cause appropriate signs giving notice of the prohibition to be posted on those streets restricting all parking except parking by the holders of permits to be granted only under the following conditions:

a. To persons who are residents of any particular area in which parking is so restricted for every vehicle owned by those persons and registered in the County;

b. To persons who are visitors of any residents of any particular area in which parking is so restricted, to be limited to that particular area in which parking is so restricted, to be valid for a stated period but no more than 30 days, and not to be to any more than two persons who are visitors at a residence during any period in which another visitor to that residence holds such a permit; and

c. To persons who do business with any resident of any particular district in which parking is so restricted during the hours of such restriction, to be limited to that particular area or areas in which parking is so restricted and in which any such person so transacts business.

However, the parking prohibitions of this section 29D shall not apply to service of delivery vehicles which are being used to provide services or make deliveries to dwellings.

On the application of any resident of the district, the Chief of Police or his authorized designee may issue permits to be valid for only one day and for no more than four hours on that day upon a showing by the resident that during the hours for which the permits are to be issued, his residence will be used in such a way consistent with its residential character and other provisions of law that visitors to his residence would not be able to park without violating the law. If the Chief of Police shall find the foregoing facts and further find that the issuance of the permits will not unduly impair traffic safety during the time of their validity, he shall issue such permits and may limit the streets or portions of streets on which they shall be valid. The number of such permits shall not any time exceed 50% of the number of spaces in which they are valid.

2. Any such person shall show to the County Manager or his authorized representative satisfactory evidence that he fulfills all the conditions for such a permit. Whenever the conditions no longer exist, the person holding such a permit issued under subparagraph 1(a) or 1(c) shall surrender it to the County Manager or his authorized representative. It shall be unlawful for any person to represent that he is entitled to such a permit when he is not so entitled, to fail to surrender a permit to which he is no longer entitled, or to park a vehicle displaying such a permit at any time when the holder of such permit is not entitled to hold it. No permit issued hereunder shall be valid for more than one year, but may be renewed upon expiration, provided the conditions for issuance exist.

3. The signs placed in such areas shall be of such character as to inform readily an ordinarily observant person of the existence of the rules and regulations imposing the foregoing restrictions. It shall be unlawful for any person to violate such rules and regulations.

4. Wherever metered parking is in effect in any portion of a district that becomes subject to the restrictions of this paragraph D, the parking spaces controlled by meters may be excepted from the provision of this paragraph so long as the control by meters continues.

5. Nothing in this Section 29.D. shall repeal or supersede any other provision of law which provides authority to regulate parking.

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APPENDIX E

[Seal]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

November 18, 1974

Mr. Charles G. Flinn
Assistant County Attorney
Office of the County Attorney
Greely Building
2100 14th Street, North
Arlington, Virginia 22201

Dear Mr. Flinn:

Your letter of September 24, 1974, requested approval of the Arlington County ordinance regarding on-street parking in residential areas. The ordinance was submitted in partial satisfaction of the requirements of 40 CFR 52.2435(c), which requires Arlington County, among others, to impose on-street parking restrictions on work commuters in areas of high employment density which

are defined as "adequately served by mass transit." The Commonwealth of Virginia is required to submit for approval by the Environmental Protection Agency a list of areas designated as "adequately served." It was suggested in the Preamble to 40 CFR 52.2435(c) (Daily Ed., 38 FR 33706, December 6, 1973) that Crystal City is such an area, but final designation has not yet been made by the Commonwealth.

In its present form, Arlington's ordinance relates only to residential areas and not to other commercial portions of Crystal City. Thus, the ordinance will be approvable only in partial satisfaction of the requirements of 40 CFR 52.2435(c). To comply fully with the regulation, on-street parking would have to be restricted also in those portions of Crystal City which are nonresidential, and the restriction would have to be effective in both commercial and residential portions from 7 a.m. to 7 p.m. Mondays through Fridays.

However, as far as it goes, it is our judgment that the ordinance can be approved. It appears to be a reasoned approach to address, among other community needs, degrading air quality due to excessive commuter parking.

We appreciate the lead Arlington County is taking in this matter and look forward to full submission following final designation of "adequately served" areas by the Commonwealth.

Sincerely yours,

/s/Alan G. Kirk II
Alan G. Kirk II
Assistant Administrator for
Enforcement and General Counsel (EG-329)

cc: Mr. Daniel Snyder, Administrator, Region III
